VISALADCHUMY NARAYANAN & ORS v. REPRESENTATIVE OF THE ESTATE OF HARIDAS NARAYANAN (DECEASED) & ORS

COURT OF APPEAL, PUTRAJAYA
ZALEHA YUSOF JCA
YAACOB MD SAM JCA
LAU BEE LAN JCA
[CIVIL APPEAL NO: N-02(NCVC)(W)-1573-08-2017]
30 JUNE 2020

LAND LAW: *Administration – Sale of land – Owner of plots of land died intestate – Administrator obtained order for sale of plots at specific value but sold plots at lower value – Whether administrator owed statutory and fiduciary duties to beneficiaries – Whether sale of land ought to be set aside – Whether sale null and void – Small Estates (Distribution) Act 1955, s. 17*

LAND LAW: *Indefeasibility of title – Sale of land – Owner of plots of land died intestate – Administrator obtained order for sale of plots at specific value but sold plots at lower value – Whether purchasers bona fide purchasers for valuable consideration – Whether immediate purchasers – Whether indefeasibility attached to purchasers' titles – Whether sale of plots of land liable to be set aside – Whether titles acquired pursuant to void instrument – Whether titles conferred on purchasers should be revoked – National Land Code, s. 340(2)*

CIVIL PROCEDURE: *Statement of claim – Amendment – Application to amend amended statement of claim – Whether filed within stipulated time – Whether amendment ought to be allowed*

One Narayanan Krishnan ('deceased'), the owner of two plots of land, died intestate, leaving 11 beneficiaries, including the first to fifth appellants ('first to fifth plaintiffs') and the first respondent ('first defendant'). The first defendant, the appointed administrator of the deceased's estate, obtained an order pursuant to s. 17 of the Small Estates (Distribution) Act 1955 ('SEDA') to sell the plots to a company at the price of RM4 per square feet. The proceeds of the said sale were to be equally divided amongst the 11 beneficiaries. According to the plaintiffs, the transaction did not materialise and they later discovered that the plots were sold to the second and third defendants, at the purchase price of RM250,000 (RM2.30 per square feet) and RM700,000 (RM2.60 per square feet) for the first and second plots, respectively, without the plaintiffs' consent. This prompted the first plaintiff to lodge caveats over the plots. According to the valuers engaged by the plaintiffs, the market value for the first and second plots were RM1,340,000 and RM450,000, respectively. The plaintiffs believed that the sales were undervalued and not favourable to them. The plaintiffs commenced an action at the High Court for, *inter alia*, (i) a declaration that the first defendant was in breach of his statutory and fiduciary duties as an

administrator; (ii) the removal of the first defendant as an administrator; and (iii) a declaration that the sales of the plots by the second and third respondents ('second and third defendants') be set aside and be declared null and void. The second and third defendants (i) counterclaimed for, *inter alia*, general, aggravated and exemplary damages for trespass caused by the plaintiffs' valuer over the plots and for the private caveats lodged over the same; and (ii) applied to strike out the plaintiffs' claim. The High Court dismissed the second and third defendants' application to strike out ('26 October order') and, the next day, the plaintiffs filed to amend the amended statement of claim to plead SEDA and/or, in the alternative, to the Probate and Administration Act 1959 ('PAA') ('encl. 143'). The Judicial Commissioner ('JC') (i) dismissed the appellants' claim and encl. 143; and (ii) allowed the second and third defendants' counterclaim. Hence, the present appeal by the plaintiffs. Prior to the hearing of the appeal, the second and third defendants applied to strike out part of the plaintiffs' notice of appeal against the decision of the JC dismissing their application for the amendment of the amended statement of claim. According to the second and third defendants: (i) the appeal against the 26 October order was filed out of time; (ii) the plaintiffs did not seek for an adjournment of the High Court proceedings to allow the plaintiffs to appeal against the 26 October order until after the completion of the proceedings on 27 March 2017; (iii) the plaintiffs did not seek leave of the court to file the notice of appeal against the 26 October order out of time; and (iv) the plaintiffs' appeal against the 26 October order was defective.

Held (allowing appeal)
Per Lau Bee Lan JCA delivering the judgment of the court:

(1) The plaintiffs did not file the amendment application out of time. The plaintiffs could still litigate the refusal of their amendment application of the amended statement of claim after the conclusion of the suit as they had in the present appeal of the dismissal of their suit and hence their right to challenge the said refusal was reserved. The JC erred in dismissing the plaintiffs' application to amend the amended statement of claim. The amendment sought by the plaintiffs was allowed. The present appeal was considered in the context of having allowed the plaintiffs' application to amend the amended statement of claim, which was to include the plaintiffs' pleading on SEDA. (paras 31 & 33)

(2) The first defendant, as the administrator of the estate, owed fiduciary duties to the plaintiffs. His duties included the duties to (i) protect the rights and interests of the beneficiaries at all material times; (ii) act with proper prudence when dealing with the estate property; (iii) obtain the best possible price for the assets of the estate that are being sold; and (iv) to distribute the proceeds of the estate property among the beneficiaries. Given that the first defendant sold the plots to the second

and third defendants at the price of RM2.30 and RM2.60 per square feet for the first and second plots, respectively, when, prior to that, the order obtained by the first defendant was to sell the plots at approximately RM4 per square feet. It defied logic that since the subsequent purchasers and the sale price at the subsequent date was lower than the sale price intended initially and given that there was no valuation done by the first defendant, it was incumbent for the first defendant to apply to the court for a fresh order under s. 60(4) of the PAA. By failing to comply with the above, the defendant breached his fiduciary duties as an administrator of the deceased's estate and his statutory duties under s. 60(4) of the PAA which rendered the sale of the plots to the second and third defendants voidable pursuant to s. 60(6) of the PAA. The JC failed to appreciate that the first defendant had breached his statutory duties under s. 17 of the SEDA and the relevant SED Regulations. Therefore, the sale of the plots to the second and third defendants were set aside. (paras 46, 64 & 65)

(3) The JC held that the second and third defendants were *bona fide* purchasers for valuable consideration and, hence, their title was indefeasible. The JC clearly erred in law and in fact. The second and third defendants were immediate purchasers of the plots and, therefore, immediate indefeasibility did not attach to their titles. The proviso to s. 340(2) of the National Land Code did not apply and it did not matter whether the second and third defendants were *bona fide* purchasers for value or not. The sale of the plots of land shall be liable to be set aside and the titles conferred on the second or third defendants should be revoked on the basis that they were acquired pursuant to a void instrument. (paras 66, 70 & 71)

Case(s) referred to:

Buttle v. Sounders [1950] 2 All ER 193 ***(refd)***

Che Ah and Che Yang Kelsom v. Che Ahmad [1940] 1 LNS 12 HC ***(refd)***

Christopher Bandi v. Tumbung Nakis & Anor; Jamil Sindi (Third Party) [2016] 4 CLJ 831 CA ***(refd)***

Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor [2014] 1 LNS 1073 CA ***(refd)***

Hjh Aminah Bakri v. Manisah Hj Bakri & Ors [1989] 1 CLJ 863; [1989] 2 CLJ (Rep) 950 HC ***(refd)***

Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***

In Re the Estate of Tunku Mohamed Jewa lbni Almarhum Sultan Abdul Hamid, deceased Tunku Ismail Tunku Mohamed Jewa & Anor v. Tunku Baharom Tunku Mohamed Jewa & Ors [1981] 1 LNS 113 ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

KFJ Sjarah House (M) Sdn Bhd v. Lembaga Kemajuan Wilayah Pulau Pinang [2011] 1 LNS 1127 HC ***(refd)***

Khoo Cheng & Ors v. Gan Hong Yock & Ors And Another Appeal [2005] 2 CLJ 85 CA

Letchumanan Chettiar Alagappan (AS Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Md Zubir Hamid & Ors v. Zahari Salleh & Ors [2018] 10 CLJ 571 CA ***(refd)***
Ong Ah Tang & Anor v. Soh Bee Yong [2013] 1 CLJ 224 CA ***(refd)***
Ong Thye Peng v. Loo Choo Teng & Ors [2008] 1 CLJ 571 FC ***(refd)***
People Realty Sdn Bhd v. Hong Leong Bank Bhd & Anor [2008] 1 CLJ 73 CA ***(refd)***
See Leong Chye & Anor v. United Overseas Bank Bhd & Another Appeal [2018] 10 CLJ 1 FC ***(refd)***
Soon Seng Company Sdn Bhd v. Toko Palayakat Jamal (M) Sdn Bhd [1999] 6 CLJ 397 HC ***(refd)***
Tan Ying Hong v.Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***
Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***
Yap Yoke Luan & Ors v. Ong Wee Tok & Ors [1983] 2 CLJ 252; [1983] CLJ (Rep) 433 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
National Land Code, s. 340(2), (3)
Probate and Administration Act 1959, ss. 8, 9, 10, 11, 12, 13, 60(3), (4), (6)
Rules of Court 2012, O. 34
Rules of the High Court 1980, O. 34
Small Estates (Distribution) Act 1955, s. 17(1)
Small Estates (Distribution) Regulations 1955, regs. 12(1), 16(1, (2), 16A, 16AA

For the appellants - Alex De Silva, Shamalah Selvarajah & Saresh Mahendaren; M/s Bodipalar Ponnudurai De Silva
For the respondents - Ahmad Fakhri Abu Samah, Muhammad Azwar Ab Manab & Nuurul Atila Mohamad Hanapi; M/s Ahmad Sukeri & Assocs

[Editor's note: Appeal from High Court, Seremban; Civil Suit No: 22NCVC-97-10-2015 (overruled).]

Reported by Najib Tamby

JUDGMENT

Lau Bee Lan JCA:

[1] This is an appeal by the appellants *vide* notice of appeal dated 2 August 2017 against the decision of the learned Judicial Commissioner ('judge') made on:

(i) 26 October 2016 dismissing the appellants' application to amend the amended statement of claim (encl. 143) with costs of RM3,000 ('the High Court order dated 26 October 2016'); and

(ii) 7 July 2017 dismissing the appellants' claims and allowing the second and third respondents' counterclaim and damages of RM5,000 with costs of RM20,000 to be paid to the first respondent and RM30,000 to be paid to the second and third respondents subject to allocatur fees.

[2] The appellants are the plaintiffs whilst the first, second and third respondents are the first, second and third defendants in the court below. We shall for purposes of this appeal refer to the parties as they were referred to in the High Court.

[3] At the hearing of the appeal on 11 April 2019 and subsequently at the continued hearing date on 9 May 2019, the second and third respondents were represented by Messrs Ahmad Sukeri & Associates. However, we observed the first respondent was not represented during the hearing of the appeal although the affidavit of service affirmed by the process server affirmed on 5 April 2019 for service of the amended notice of appeal dated 14 December 2018 and the appellants' solicitors' letters dated 21 December 2018 informing the first respondent of the date of hearing of the appeal showed that the said documents were duly served. Likewise, the affidavit of service of the same process server affirmed on 3 May 2019 for service of the appellants' solicitors' letter 15 April 2019 informing the first respondent of the continued hearing date showed that the said letter was duly served.

[4] Having carefully considered the submissions of the respective counsel and having perused the records of appeal before us, we unanimously allowed the appeal. These are the reasons for our decision.

Background Facts

[5] There are 11 beneficiaries to the estate of one Narayanan a/l Krishnan ('the deceased') who died intestate on 4 July 1989, including the first to fifth plaintiffs and the first defendant, who are brothers and sisters. On 10 November 2015, the first plaintiff died intestate and by an order of the court dated 28 December 2015, the proceedings in the suit was ordered to be carried between the first to fifth plaintiffs and for the sixth plaintiff to be made a party to the suit as a plaintiff in substitution of the deceased first plaintiff. The first defendant was appointed as the administrator of the deceased's estate *vide* the letter of administration dated 28 September 1990.

[6] At all material times, the deceased was the original owner of the two plots of land known as Geran Mukim 452 Lot 5368 measuring 6.101 acres ('first plot') and Geran Mukim 895 Lot 5589 measuring 2.454 acres at Mukim Labu, Gadung Jaya, District of Seremban, Negeri Sembilan Darul Khusus ('second plot') (collectively referred to as 'the two plots of land').

[7] On 24 July 1997, upon an application made by the first defendant to the Land Office of Negeri Sembilan, the first defendant had obtained an order pursuant to s. 17 of the Small Estates (Distribution) Act 1955 (Act 98) ('SEDA 1955') to sell the two plots of land to a company for an agreed price of RM4 per square foot (this price of "RM4" is as pleaded by the plaintiffs) and the proceeds of sale to be equally divided amongst the 11 beneficiaries of the deceased's estate ('order dated 24 January 1997').

[8] However, the plaintiffs alleged that the sale and purchase transaction for the agreed price of RM4 per square foot did not materialise. Instead, on 2 June 2014, the plaintiffs discovered the two plots of land were sold to the second and third defendants with a purchase price of RM250,000 for the first plot which is equivalent to RM2.30 per square foot and RM700,000 for the second plot which is equivalent to RM2.60 per square foot. At all material times, the first defendant did not dispute having received the purchase price totalling RM950,000 from the second and third defendants. The sale and purchase of the two plots of land to the second and third defendants was alleged by the plaintiffs to be without their consent.

[9] Consequently, the first plaintiff had lodged caveats over the two plots of land on behalf of the plaintiffs. On 2 June 2014, the fifth plaintiff had lodged a police report against the first defendant contending that the first defendant had breached the obligations and duties vested on him as the administrator of the deceased's estate and had committed fraud in disposing the two plots of land to the second and third defendants.

[10] By way of letters dated 16 June 2014 and 10 July 2014, the first plaintiff applied for notes of proceedings and had obtained the same in respect of two hearings held at the land office on 28 September 1990 and 24 January 1997.

[11] Sometime in 2015, the plaintiffs engaged M/s Raine and Horne International Zaki & Partners Sdn Bhd to determine the market value of the two plots of land at the time of the said sale. According to the valuation report, the market value of the two plots of lands at the time of the said sale were RM1,340,000 and RM450,000 respectively totalling RM1,790,000. According to the plaintiffs, the sales were undervalued and not favourable to them.

[12] On 19 October 2015, the plaintiffs filed a writ of summons and statement of claim seeking, among others, (i) a declaration that the first defendant was in breach of his statutory and fiduciary duties as administrator of the deceased's estate; (ii) that the first defendant be removed as an administrator; (iii) a declaration that the sales of the two plots of land by the second and third defendants be set aside and are declared null and void.

[13] The second and third defendants later filed their defence and counterclaim seeking, among others, general damages, aggravated and exemplary damages for the trespass caused by the plaintiffs' private valuer over the two plots of land and for the private caveats lodged over the same.

[14] The appeal before us is brought by the plaintiffs against the High Court order dated 26 October 2016 and the order dated 7 July 2017.

Decision Of The Court

[15] We shall only deal with the issues which we consider relevant for purposes of disposing this appeal.

Appeal Against The Dismissal Of The Application To Amend The Amended Statement Of Claim

[16] As for the dismissal of the plaintiffs' application to amend the amended statement of claim (encl. 143), all the learned judge stated was:

> … Permohonan plaintif-plaintif tersebut telah tidak dibenarkan oleh mahkamah ini dan rayuan telah dibuat oleh plaintif-plaintif pada 2.8.2017. Keputusan mahkamah ini menolak Notis Permohonan untuk meminda Pernyataan Tuntutan adalah bertarikh 26.10.2016. Notis rayuan tersebut difailkan di luar masa yang ditetapkan dan tiada permohanan untuk lanjutan masa difailkan ke mahkamah ini.

(para 63 grounds of judgment ('grounds')

[17] Prior to addressing the merits of the amendment application, it would be useful to state the following events that transpired. It is not disputed that when this suit was fixed for trial in the Seremban High Court, the second and third defendants made an application to strike out the plaintiffs' claim in the High Court on the ground that there was no cause of action against the second and third defendants. The second and third defendants appealed against the decision of the High Court dismissing the striking out application. During the hearing of the said appeal before this court on 22 August 2016, the second and third defendants raised points of law pertaining to SEDA 1955 which they did not raise at the High Court. The said appeal of the second and third defendants was dismissed.

[18] It is not disputed that on 23 August 2016 (a day after the dismissal of second and third defendants' striking out application), the plaintiffs filed encl. 143 to amend the amended statement of claim to plead SEDA 1955 and further and/or in the alternative to the Probate and Administration Act 1959 (Act 97) ('PAA 1959'). The said proposed amendments are reflected in paras. 17.2 to 17.7 of the proposed re-amended statement of claim (annexure A to the affidavit in support of encl. 143).

[19] It is to be noted that the events mentioned in paras. 17 and 18 above occurred prior to the making of the High Court order dated 26 October 2016.

[20] Prior to the hearing of the plaintiffs' appeal *vide* notice of appeal dated 2 August 2017 before us, the second and third defendants had filed a notice of motion on 25 September 2017 (encl. 4) to strike out part of the said plaintiffs' notice of appeal against the decision of the learned judge dismissing their application for amendment of the amended statement of claim. The second and third defendants alleged, among others, that (i) the appeal against the High Court order dated 26 October 2016 has been filed out of time; (ii) the plaintiffs did not seek for adjournment of the High Court proceedings to allow the plaintiffs to appeal against the High Court order dated 26 October 2016 until after the completion of the proceedings on 27 March

2017; (iii) the plaintiffs did not seek leave of this court to file the notice of appeal against the High Court order dated 26 October 2016 out of time; and (iv) the plaintiffs' appeal against the High Court order dated 26 October 2016 is defective.

[21] Based on the order of the Court of Appeal dated 27 February 2018, the notice of motion (encl. 4) was heard and accordingly dismissed.

[22] Reverting to the merits of the appeal in respect of the amendment application, the learned judge had dismissed the amendment application as the notice of appeal dated 2 August 2017 against the High Court order dated 26 October 2016 was filed out of time and no application of extension of time to file the notice of appeal had been filed. In our considered view, the reason for the learned judge's dismissal of the amendment application is academic because those were the grounds ventilated by the second and third defendants in their notice of motion filed on 25 September 2017 (encl. 4) to strike out the plaintiffs' appeal against the High Court order dated 26 October 2016 which was dismissed by this court.

[23] Counsel for the second and third defendants argued that the amendment application was made in the course of trial, it was a second amendment to the statement of claim and the plaintiffs failed to appeal notwithstanding that the amendment application was not granted by the High Court (para 49 of second and third defendants' written submission dated 8 April 2019).

[24] Counsel for the plaintiffs submitted that the plaintiffs did not proceed to appeal against the High Court order dated 26 October 2016 at that point in time as the plaintiffs took it as a ruling made during the course of trial and are therefore appealing to this court in the present appeal. In support thereof, counsel relied on a decision of this court in *Christopher Bandi v. Tumbung Nakis & Anor; Jamil Sindi (Third Party)* [2016] 4 CLJ 831; [2016] 4 MLJ 100 for the proposition that the appellant could still litigate the trial court's refusal to allow the amendment application in the appellate court if there was an appeal by the appellant after the conclusion of the trial of the suit and the appellant still reserved the right to challenge the Sessions Court's refusal to allow the requested amendment.

[25] Counsel for the second and third defendants in submission:

(i) quoted paras. 16 to 20 of *Christopher ak Bandi*'s case and merely submitted that the application of the plaintiff to amend his statement of claim was rejected by the High Court without analysing the case; and

(ii) stated in so far as the amendment application of the amended statement of claim is concerned, the second and third defendants referred this court to the reliefs at paras. 23(a) and 23(c) of the amended statement of claim

submitting that the plaintiffs had relied on the PAA Act and Trustee Act 1949 and not the SEDA 1955 which the former contended was the law applicable from the inception.

[26] In *Christopher ak Bandi*'s case, the appellant sued the respondents in the Sessions Court for damages arising from a road accident. After one witness testified and the trial was adjourned to another date, the appellant filed a formal application to amend his writ and statement of claim to include an additional claim for "cost of professional care." The Sessions Court dismissed the application. On the appellant's appeal against the dismissal, the High Court sustained a preliminary objection by the respondents and the third party that the Sessions Court's ruling was not a "decision" under s. 3 of the Courts of Judicature Act 1964 ('the CJA') which could be appealed against as it was "made in the course of a trial or hearing and did not have the effect of finally disposing of the rights of the parties". The appellant argued that an application to amend pleadings was not caught by s. 3 of the CJA as the Rules of Court 2012 allowed an application to be made at any stage of the proceedings including after trial but before judgment was handed down.

[27] In *Christopher ak Bandi*, the fact that the High Court dismissed the appellant's application to amend by sustaining the preliminary objection of the respondents which was upheld by the Court of Appeal is not disputed. The Court of Appeal had dismissed the appellant's appeal primarily on two grounds:

(i) The finding that the factual matrix of the appeal therein was similar to the Court of Appeal's decision of *Datuk Seri Tiong King Sing v. Datuk Seri Ong Tee Keat & Anor* [2014] 1 LNS 1073; [2015] 1 MLJ 847. On the principle of *stare decisis*, the Court of Appeal held it was bound by the decision of the Federal Court on 7 March 2016 in upholding the Court of Appeal's decision of *Datuk Seri Tiong King Sing*'s case which held that a ruling made by the High Court in the course of a trial which did not finally dispose of the rights of the plaintiff could not be appealed against.

(ii) Application of principles pronounced by the Federal Court in *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1; [2016] 1 MLJ 301 which concerned an application to amend pleadings and the principle of *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428; [1983] 1 MLJ 213 was discussed.

[28] The foregoing paragraphs quoted by the second and third defendants concerned the case of *Hong Leong Finance Bhd v. Low Thiam Hoe* (*supra*) and the observations of the Federal Court regarding the new pre-trial case management regime under O. 34 RHC 1980 and now under O. 34 of the ROC 2012 calling for a different approach to prevent delay in the progress of a case

to trial and for its completion and where an application to amend the pleading is made at a very late stage, the principles of *Yamaha Motor* ought not to be the sole consideration. David Wong JCA (later Chief Judge SS) (as he then was) (delivering the judgment of the court) stated that the case before them was "a glaring example of unnecessary delay''. His Lordship held that to concede to the contention of the appellant that his matter was appealable would "give a party an extra bullet, so to speak, to delay an expeditious trial and would also be inconsistent to the jurisprudence of the present regime of civil procedure."

[29] In our considered view, counsel for the plaintiffs exercised prudence in abstaining from filing an appeal against the ruling of the learned judge *vide* High Court order 26 October 2016 for the reasons expressed by this court in *Christopher ak Bandi*'s case, ie, it would be non-appealable and would not be in accord with the jurisprudence expounded by the Federal Court in *Hong Leong Finance Bhd v. Low Thiam Hoe*.

[30] What is significant is the decision of the Court of Appeal in *Christopher ak Bandi*'s case does not end there after the deliberation of the two cases alluded in paras. 27 and 28 above. With respect, what counsel for second and third defendants failed to observe which counsel for the plaintiffs did and utilised the same to his clients' advantage was, despite dismissing the appellant's appeal, His Lordship at p. 839 (CLJ); 110 (MLJ) concluded:

> [21] Finally, we wish to reiterate that the appellant can still litigate the refusal of the sessions court judge in allowing the application for amendment of the writ and statement of claim in the appellate court if there is an appeal by the appellant after the conclusion of the trial of the suit. Hence, the appellant still reserves this right to challenge this refusal of the sessions court to allow the requested amendment.

[31] Premised on the view expressed by this court in *Christopher ak Bandi*'s case at 110 para. [21] quoted above and with which we agreed, in our judgment, counsel for the plaintiffs did not file the amendment application out of time. This is because the plaintiffs can still litigate the refusal of their amendment application of their amended statement of claim after the conclusion of the suit as they have before us the appeal of the dismissal of their suit and hence their right to challenge the said refusal is reserved. In light of the above, we find the learned judge had erred in dismissing the plaintiffs' application to amend the amended statement of claim. We therefore allowed the amendment sought by the plaintiffs.

Main Appeal Against The Dismissal Of The Suit

Whether There Was A Breach Of Statutory And Fiduciary Duties?

[32] At the outset, we wish to place on record that during oral submission, counsel for the plaintiffs conceded that the plaintiffs were no longer pursuing on the issue of fraud, which included the issue of whether the learned judge erred when Her Ladyship held that the first defendant obtained the State Authority's consent to transfer the two plots of land to the second and third defendants *vide* letters from the District and Land Office Seremban dated 3 March 2014.

[33] The following appeal is considered in the context of us having allowed plaintiffs' application to amend the amended statement of claim, which is to include the plaintiffs' pleading on SEDA 1955. It not disputed that the first defendant, Haridas, was the administrator of the deceased's estate and that the first defendant had sold the two plots of land to the second and third defendants. The crux of the appeal before us revolved around the issue of whether the sale and transfer of the two plots of land by the first defendant to the second and third defendants was done in accordance with the PAA 1959 and /or SEDA 1955. The second and third defendants (first defendant was unrepresented) have taken the position that the PAA 1955 does not apply to the facts of this appeal and the only applicable statute was the SEDA 1955. The plaintiffs however submitted that regardless of which statute applied, there was non-compliance by the first defendant in transferring the two plots of land to the second and third defendants.

[34] In *Ong Thye Peng v. Loo Choo Teng & Ors* [2008] 1 CLJ 571; [2008] 4 MLJ 31, the deceased, a registered proprietor of a property died testate. By a sale and purchase agreement, the first and second respondents who were appointed as trustees of the estate by order of the court sold the property to the third to eighth respondents (purchasers). Clause 8 of the agreement provided that the trustees shall also apply to the court for formal sanction to sell the property in accordance with the PAA 1959. The purchasers instituted proceedings (1981 civil suit) against the trustees and the State Government of Penang for specific performance of the agreement (suit against the latter was discontinued). The appellant, one of the original executors and trustees of the deceased's will, upon his application was added as a defendant to the 1981 civil suit, denied the validity of the agreement and alleged, among others, that the trustees could not lawfully enter into the agreement without prior approval of the court and him.

[35] We are conscious that the facts of *Ong Thye Peng's* case (*supra*), a case cited by both the plaintiffs and second and third defendants, differ from the facts of the appeal before us. Nevertheless, we are of the view that the judicial pronouncements of the Federal Court emanating from one of the questions of law ie, question number 3 formulated for its determination is relevant in the disposal of the issue before us.

[36] Question number 3 states:

> Whether the beneficiaries of an estate of a person who dies testate should, in law, be entitled to the same measure of protection as that afforded to beneficiaries under the provisions of the Probate and Administration Act 1959 and judicial pronouncements thereof.

The appellant relied on *Hjh Aminah Bakri v. Manisah Hj Bakri & Ors* [1989] 1 CLJ 863; [1989] 2 CLJ (Rep) 950; [1989] 1 MLJ 350 for the proposition that an executor, being a trustee, owed a duty to obtain the best price for the assets of the estate that is being sold and that the relevant date to determine whether the sale price is fair is at the date of the hearing of the application for the sanction to sell. The respondent however contended there is a distinction between a sale by an administrator and an executor or trustee and that the appellant's case was founded on s. 60(4) PAA 1959 which refers to "administrator" and not an "executor'' or " trustee".

[37] In addressing the arguments of the appellant and the respondent the Federal Court in *Ong Thye Peng*'s case opined at p. 600 (CLJ); p. 52 (MLJ) as follows:

> [21] *In our opinion the language employed in s. 60 of the 1959 Act is clear. It is concerned with the manner of disposal of the property of a deceased person by his personal representative*. Section 60(3) of the 1959 Act deals with the disposal of the property of a person who dies testate while *s. 60(4) at the 1959 Act deals with the property of a person who dies intestate. Under s. 60(4)(a) of the 1959 Act, the immovable property of a person who dies intestate may not be disposed of without the previous permission of the court.* Under s. 60(3) of the 1959 Act, the property of a person who dies testate may be disposed of in any manner the executor may think proper subject to the imposition of any restriction by the will of the deceased. In that event the executor may still do so in accordance with an order of the court. What requires deliberation is the difference in law, if any, in the manner of disposal of the property of a person who dies testate and a person who dies intestate.
>
> (emphasis added)

[38] The Federal Court in *Ong Thye Peng*'s case considered another of its case in *Yap Yoke Luan & Ors v. Ong Wee Tok & Ors* [1983] 2 CLJ 252; [1983] CLJ (Rep) 433; [1984] 1 MLJ 23, which was relied on by the plaintiffs. In *Yap Yoke Luan* (*supra*) the first and second respondents, as the administrators of the estate of a deceased person, had agreed to sell land belonging to the estate to the respondents. The sale was subject to obtaining leave of court provided in the sale agreement. The beneficiaries were cited as respondents and the appellants applied to be added as interveners. The application was dismissed by the learned judge as the beneficiaries opposed the application on the grounds, among others, that the agreed purchase price was grossly below the market value.

[39] The Federal Court in *Ong Thye Peng*'s case opined that the effect of s. 60(4) of PAA 1959 was considered in *Yap Yoke Luan* and referred to the *dicta* of Syed Agil Barakbah FJ (as he then was) at pp. 435-436 (CLJ); p. 25 (MLJ) as follows:

> In this regard we are of the view that the appellants as the proposed purchasers under a conditional contract were perfectly well aware that their contract had to be approved by the court before it could be carried into effect and they had taken the risk of losing their bargain if the court refused to grant such approval. *The duty of the court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion the court will have to look into the facts and surrounding circumstances of the case i.e. whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price*. The court is concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing the application for approval of the proposed sale. (*Che Ah and Che Yang Kelsom v. Che Ahmad* [1941] MLJ 126, and *Buttle v. Saunders* [1950] 2 All ER 193, at p. 195 and *Tunku Ismail & Ors* [1982] 2 MLJ 44). We agree with respect with the learned judge that the purchase consideration of $150,000 was manifestly low in the light of the valuation of the market value of $244,000 for the said land at the material time. *It was apparent that the administrators had failed to carry out their duty as trustees to obtain the best possible price*. Since most of the beneficiaries had not been consulted nor their consent been obtained, the administrators should have applied the common sense rule of calling for a valuation report. That would have assisted them in considering whether the purchase consideration they had agreed upon was reasonable as the best possible price.
>
> (emphasis added)

[40] The Federal Court in *Ong Thye Peng*'s case also considered the case of *Hjh Aminah bte Bakri* (*supra*) where the issue of whether the requirement of obtaining the best possible price as at the date of hearing is also applicable where an order of the court is sought for the disposal of property of a person who dies testate. The Singapore High Court held the relevant date to determine whether the sale price is fair is the date of hearing of this application and not at the time of offer.

[41] *Albeit* in the context of *Ong Thye Peng*'s case, the Federal Court was concerned with the duty of executors, the Federal Court compared it to the role of the administrators towards the estate and found their roles to be synonymous. This appears at p. 603 (CLJ); p. 55 (MLJ) as follows:

> [24] As they must act in the interest of all beneficiaries their duty is to ensure that the estate of which they are trustees benefits as much as possible when they deal with trust property. *The result is that the obligation of executors and administrators towards the estate of which they are personal representatives must be the same. This is because their primary duty is to protect the*

rights and interests of the beneficiaries. There can therefore be no difference in the duty of administrators and executors in the sale of estate property. It follows that even in the case of a sale of property by an *executor the relevant date to determine whether the price for the hearing of the application for approval of the proposed sale just as in the case of a sale by an administrator as explained in Yap Yoke Luan & Ors v. Ong Wee Tok & Ors [1984] 1 MLJ 23 referred to earlier*". (emphasis added)

[42] The Federal Court in *Ong Thye Peng*'s case at 55 (MLJ) further opined that under the PAA 1959, the order of the court sought under s. 60(4) which refers to obtaining the 'permission' of the court to approve the sale, and that under s. 60(3) which refers to 'order of the court' for the disposal of any property are placed in the same position because the different language employed in both the subsections require the application of the same tests of a consideration of the interests of the estate in making the order.

[43] Similar interpretations on s. 60(4) of the PAA 1959 which are in accord with the decisions in *Ong Thye Peng* and *Yap Yoke Luan* with respect to the procedure to be followed by an administrator in the disposal of immoveable property of the estate of a deceased who died intestate and thus more akin to the facts of the appeal before us are the following decisions of this court cited by the plaintiffs:

(i) *Khoo Cheng & Ors v. Gan Hong Yock & Ors & Another Appeal* [2005] 2 CLJ 85; [2005] 3 MLJ 614, where the deceased died intestate leaving immoveable property comprising 40 lots of land which formed the subject matter of the two appeals. All the appellants and respondents were beneficiaries of the estate. The administrators (wife of the deceased and two of their children) were among the appellants. Orders were sought for distribution of the estate of the deceased and the administrators' application under s. 60(4) of the PAA 1959 for permission of court to sell the said lots of land. On the latter, this court held:

> These provisions are intended to prevent any improper sale of or dealing in the immovable property of the estate of a deceased by an administrator, who is required by law to apply to the High Court for an order of sale, supported by affidavit exhibiting a reliable valuation report on the property concerned for the consideration of the judge.
>
> Once the order of sale made under s 60(4) of the Probate and Administration Act, it is the duty of the administrators to sell the estate property at a price not lower than the reserved price. The administrators should act in the best interest of the estate and sell it at the highest price that is available.

(ii) *Ong Ah Tang & Anor v. Soh Bee Yong* [2013] 1 CLJ 224, where this court followed the principles in *Ong Thye Peng* and *Yap Yoke Luan*. This court allowed the appeal of the appellants (joint administrators with the respondent of the deceased's estate) held (i) that s. 60(4) of the PAA 1959 provides that an administrator may not sell any immovable property without the sanction of the court; and (ii) ordered the lands to be sold by public auction and set aside the order of the High Court which ordered the sale of the two lands forming the estate of the deceased to the respondent as it was against the wishes of the majority of the beneficiaries who supported the appellants' application that the lands be sold by public auction and there was no evidence before the court to determine what was the best possible price of the lands at the time of making the order.

(iii) *Md Zubir Hamid & Ors v. Zahari Salleh & Ors* [2018] 10 CLJ 571; [2017] 4 MLJ 351, where this court at 354 (MLJ) held that the first defendant as administrator of the estate had sold the land without the leave of the court. Obtaining leave of the court to sell an estate property is a mandatory requirement under s. 60(4) of the PAA 1959 and that the procedure as a matter of practice requires the court to inquire the views of the beneficiaries.

[44] We wish to make the following observations. Interestingly, this court in *Khoo Cheng* (*supra*) at 622 (MLJ) referred to the cases below and made the following observations:

(i) *Che Ah and Che Yang Kelsom v. Che Ahmad* [1940] 1 LNS 12; [1941] MLJ 126 where the former Court of Appeal stated that "the first duty of the court is to protect the interests of the estate" and did not approve the lower price and ordered the sale at the higher reserved price;

(ii) *Buttle v. Sounders* [1950] 2 All ER 193 where the court therein held that the trustees "have an overriding duty to obtain the best price which they can for the beneficiaries" gave them liberty to sell to a serious purchaser at the highest price; and

(iii) *In Re the Estate of Tunku Mohamed Jewa lbni Almarhum Sultan Abdul Hamid, deceased Tunku Ismail Tunku Mohamed Jewa & Anor v. Tunku Baharom Tunku Mohamed Jewa & Ors* [1981] 1 LNS 113; [1982] 2 MLJ 44, where Syed Agil Barakbah J (as he then was) said "I feel it is my duty to protect the rights of all the beneficiaries in the land to be sold."

[45] Further, the cases alluded in the preceding sub-paras (i), (ii) and (iii) were the very same cases relied on by the Federal Court in *Yap Yoke Luan* (at pp. 435 & 436 (CLJ); p. 25 (MLJ)) and the Federal Court had remarked (p. 436 (CLJ; p. 25 (MLJ)) that "The well accepted principle in *Che Ah & Che Yang Kelsom*'s case did not appear to have been cited. We feel that had

that been brought to the attention of the learned judge, his decision would have been different." The principles in *Che Ah & Che Yang Kelsom*'s case were applied in *Hjh Aminah bte Bakri* which the Singapore High Court noted was applied in *Re the Estate of Tunku Mohamed Jewa* and *Yap Yoke Luan*. Finally, as for the latter case, the Federal Court in *Ong Thye Peng* endorsed the view it expressed therein.

[46] Premised on the authorities discussed above, we agreed with the submission of counsel for the plaintiffs that the first defendant, Haridas as administrator of the estate of the deceased owed fiduciary duties to the plaintiffs, the beneficiaries of the estate of the deceased. His duties included:

(i) A duty to protect the rights and interests of the beneficiaries at all material times;

(ii) A duty to act with proper prudence when dealing with the estate property;

(iii) A duty to obtain best possible price for the assets of the estate that are being sold; and

(iv) A duty to distribute the proceeds of the sale of the estate property among the beneficiaries.

[47] In addition, we have reproduced the following provisions of the SEDA 1955 and the Small Estates (Distribution) Regulations 1955 ('SED Regulations') and the relevancy of the same would become apparent as the parties' arguments in relation to the order dated 24 January 1997 would reveal hereafter.

[48] Section 17 of the SEDA 1955 provides:

> 17. Subsequent applications.
>
> (1) Where it becomes necessary to appoint a new trustee or a new administrator or to make any other or further order or to withdraw a caveat the party interested may make an application to the Land Administrator, in the prescribed form or in any other form which the Land Administrator may permit, and thereupon the Land Administrator shall investigate the matter and cause notice to be given to any other party affected and if the matter is contentious he shall set it down for hearing in the same manner as a petition for distribution under this Act and after the investigation or hearing he shall make such order or to do any other act as may be necessary to give effect to his decision and if necessary shall arrange for the order so far as it relates to land to be registered as may be necessary.

[49] SED Regulations 16A and 16AA state:

> 16A. Sale by private treaty.
>
> Subject to any written law, upon application by the administrator under section 17 of the Act the Land Administrator may order the land to be sold by a private treaty.
>
> 16AA. Exercise discretion b the Land Administrator.
>
> In the exercise of any discretion under this regulation, the Land Administrator shall take into consideration that:
>
> (a) the potential buyer has been ascertained;
>
> (b) the sale price which is equal to the market value of the land or at any value as agreed by the beneficiaries and deem fit by the land Administrator has been determined.

[50] Premised on paras. 37-40 of the grounds, the learned judge held that pursuant to the order dated 24 January 1997, (i) the first defendant had the right to sell the two plots of land to the second and third defendants; (ii) the second and third defendants had obtained the consent from the beneficiaries to sell the two plots of land and there is no requirement to obtain another order to sell the same (para. 25 of grounds); and (iii) s. 60(6) of the PAA 1959 did not apply as the order to sell the two plots of land had been obtained.

[51] Counsel for the second and third defendants contended that (i) it was not disputed that consent had been obtained from all the beneficiaries based on the order in Form T ie, the order dated 24 January 1997; (ii) the order dated 24 January 1997 was not set aside, cancelled or appealed against by the plaintiffs; (iii) the status of the first defendant as administrator of the deceased's estate was not challenged; (iv) s. 60(4) of the PAA 1959 was not applicable as the applicable law was the SEDA 1955, (v) the second and third defendants are *bona fide* purchasers (to be dealt with); and (vi) the plaintiffs' claim was in fact an internal dispute among the beneficiaries.

[52] Counsel for the plaintiffs argued that the learned judge erred when she failed to consider there was a need for a fresh order to sell the two plots of land citing *Soon Seng Company Sdn Bhd v. Toko Palayakat Jamal (M) Sdn Bhd* [1999] 6 CLJ 397; [1999] 5 MLJ 75 because:

(i) the order dated 24 January 1997 was obtained based on the circumstances that existed in 1997 when there was a potential sale of the two plots of land to a company for the price of RM4 per square feet;

(ii) in 2013, the first defendant sold the two plots of land to the second and third defendants at the price of RM2.30 per square feet for the first plot (Lot 5368) and RM2.60 per square feet for second plot (Lot 5589) when in fact the order dated 24 January 1997 relied on by him made 16 years prior to the sale itself provided for the two plots of land to be sold at the price of RM4 per square feet; and

(iii) the first defendant had breached the general duties as administrator of the deceased's estate and his statutory duties under s. 60(4) of the PAA 1959 and/or s. 17(1) of the SEDA 1955.

[53] In our judgment, there is no merit in the submissions of the second and third defendants. Based on the wordings of s. 17 of the PAA 1955 and in the context of the appeal before us, it is clear that the section envisages and prescribes the procedure of making subsequent applications as follows:

(i) the administrator as the party interested may make an application to the Land Administrator where it becomes necessary to make any other or further order;

(ii) using the prescribed form, Form P under reg. 12(1) of the SED Regulations or any other form which the Land Administrator may permit;

(iii) the Land Administrator shall then investigate the matter and cause notice to be given to any other affected party (Form S, under reg. 12(1) of the SED Regulations, where appropriate) and if it is contentious, set the matter for hearing in accordance with the procedure set for hearing of a petition for distribution (ss. 8 to 13 of the PAA 1959). After the investigation or hearing, he shall make such order or do any other act as may be necessary to give effect to his decision.

[54] Terms like "subsequent applications" and "where it becomes necessary to make any other or further order" found in s. 17 SEDA 1955 lend support to the fact that more than one application can be made under s. 17 as long as the criteria for making the request by the administrator is met. Form P which is the prescribed form for an application under s. 17 (unless the Land Administrator permits use of any other form), specifies, among others, the entry of the following particulars:

SUBSEQUENT APPLICATION

(Section 17)

WHEREAS on the ... day of ... 20 ... an order was made herein that (1)

AND WHEREAS it has become necessary to (2)

I, ... of ... apply to the (3) ... ... for the said District of ... for the (4)

Made this ... day of ... 20 ...

...

Applicant

[55] The particulars in Form P which are relevant to the issue at hand are:

(i) Insert (1) refers to the previous order granted under s. 17;

(ii) Insert (2) refers to the requirement for making the subsequent application "eg, appoint a new trustee; new administrator, withdraw caveat etc."

(ii) Insert (4) refers to "nature of the relief sought"

The usage of the words "eg" and "etc." in insert (2) presupposes that the requirements stated therein are purely illustrative and an application under s. 17 can be made under a myriad of circumstances.

[56] Regulations 16A and 16AA of the SED Regulations provide for a sale transaction by private treaty and it is not a sale of land by auction ordered by the Land Administrator (reg. 16(1)) or sale by tender among the beneficiaries ordered by the Land Administrator (reg. 16(2)).

[57] We are of the considered view that s. 17 of the SEDA 1955 has to be read with regs. 16A and 16AA of the SED Regulations. First, it is due to the presence of the words "upon application by the administrator under s. 17 of the Act" in reg. 16A. Secondly, under reg. 16A, the Land Administrator has the discretion to order the land to be sold by private treaty by virtue of the word "may". Thirdly, whilst the Land Administrator has the discretion to order the land to be sold by private treaty under reg. 16A, such order by the Land Administrator is governed by the opening words "Subject to any written law" (which we will address later). Finally, the exercise of the discretion envisaged by reg. 16A is amplified by reg. 16AA which provides for the matters which the Land Administrator shall take into consideration when he exercises his discretion in making an order for sale of land by private treaty. The two mandatory requirements are:

(a) the potential buyer has been ascertained;

(b) the sale price which is equal to the market value of the land or at any value as agreed by the beneficiaries and deem fit by the Land Administrator has been determined.

[58] Further, we are of the view that the usage of the opening words "Subject to any written law" in reg. 16A means that in an application by an administrator under s. 17 of the SEDA 1955, the Land Administrator's exercise of discretion to order the land to be sold by private treaty is "subject to any written jaw" and the "written law" envisaged here would include s. 60(4) of the PAA 1959.

[59] Before we discuss further the relationship between the relevant legal provisions under the PAA 1959, the SEDA 1955 and the relevant Regulations therein, we wish to touch on the sale price of the two plots of

land during the second hearing on 24 January 1997. On a perusal of the pleadings, the plaintiffs' pleaded case is (i) the price of the two plots of land to be sold to the unnamed company as requested by the first defendant is RM4 per square feet, (ii) the order dated 1997 is to sell at that price and (iii) the sale of the two plots of land at that price did not materialise. However in his statement of defence, the first defendant held a contradictory position when he admitted what is stated in sub-para (i) but denied sub-paras (ii) and (iii). The second and third defendants pleaded they had no knowledge of the price as they were not privy to the claims of the plaintiffs.

[60] The notes of proceedings ('NOP') of the Land Administrator of the second hearing on 24 January 1997 pertaining to the request of the first defendant resulting in the order dated 24 January 1997 which the plaintiffs' counsel drew to our attention to support their submission reads as follows:

> Saya minta membuat permohonan ulang bicara kerana kawasan RTN Gadon Jaya ada syarikat yang bercadang hendak beli **dengan harga yang agak baik iaitu lebihkurang RM4.00** dan masih dalam perundingan.
>
> Saya dan waris-waris telah bersetuju **dengan harga yang ditawarkan**. Sekarang saya sebagai Pentadbir mohon satu perintah dikeluarkan bagi membolehkan saya menjual dan membuat pindahmilik kepada pembeli berkenaan.
>
> (emphasis added)

[61] In line with the foregoing contemporaneous document, we would regard the intended sale price of the two plots of land on 24 January 1997 was "approximately RM4 per square feet." In our view, even taking the sale price of the two plots of land was intended at approximately RM4 per square feet and not *per se* RM4 per square feet as the plaintiffs contended, the slight difference in price does not detract from the fact that the intended sale price was hovering around the figure of RM4 per square feet.

[62] Based on the legal principles governing s. 60(4) PAA 1959 and s. 17(1) SEDA 1955 which we have discussed above, we find there are common safeguards in respect of the disposal of immovable property of a deceased's estate by an administrator, be it under s. 60(4) PAA 1959 or s. 17(1) SEDA 1955, namely:

(i) it requires the administrator to make an application, in the case of the former, obtain the "permission of the court" and in the case of the latter, make an application to the Land Administrator; and

(ii) the underlying principle to be gleaned in the exercise of discretion by the court and the Land Administrator is to protect the right and interests of the beneficiaries, the beneficiaries must be consulted and consent procured and to obtain the best possible price for the land in question (to be dealt).

[63] In *Soon Seng Co* (*supra*), briefly, the administrator of the deceased's estate entered a written agreement with the plaintiff who paid a deposit of RM115,000 for sale of property of which the deceased was the registered owner. The administrator had obtained an order of the court for sale of the property to the plaintiff. A dispute arose between the administrator and the plaintiff. The defendant entered a caveat over the property on the basis that it had paid RM55,000 for the purchase of the property. In considering the plaintiff's application for removal of the caveat, one of the issues determined by the High Court is whether the administrator must reapply to the court for sale of the property to the defendant. The defendant's argument which is not unlike the second and third defendants in the appeal before us, since the administrator had already obtained the court's permission earlier the sale of the property to the plaintiff, there was no need to obtain a second permission for sale of the property to the defendant. The court found the defendant's argument flawed from inception and held that the administrator ought to have obtained a fresh consent order pursuant to s. 60(4) PAA 1959 for the sale of the property to the defendant and failure to obtain such a consent must, *prima facie*, render the contract if any between the defendant and the administrator voidable pursuant to s. 60(6) PAA 1959. The court's rationale, among others, is as follows (p. 404 (CLJ); p. 84 (MLJ)):

> The reason why the court requires its consent for the sale of any immovable property of a deceased by the administrator pursuant to s. 60(4) of the Probate and Administration Act 1959 is to protect the interest of the beneficiaries. When the court gave its consent for the sale of the said property to the plaintiff, it was aware of the details of the sale including the fact that the total purchase price was RM1,150,000.00. Surely common sense dictates that if the administrator contends that the earlier agreement to sell based on which the court's consent was obtained is deemed aborted, then the court's fresh approval must be obtained for a subsequent sale. The court will not lend its benign hand to any nefarious schemes. I, therefore, hold that the administrator in this case ought to have obtained a fresh consent pursuant to s 60(4) of the Probate and Administration Act 1959 for the sale of the said property to the defendant. The failure to obtain such a consent must, *prima facie*, render the contract, if any, between the defendant and the administrator voidable pursuant to s. 60(6) of the said Act. On this score too, the defendant has failed to establish that it has a caveatable interest.

[64] We agreed with the view expressed by the learned judge in the *Soon Seng Co* which is in accordance with the judicial pronouncements in relation to the disposal of land of a deceased estate by an administrator enunciated by our superior courts in the cases which we have referred to earlier. Given that in 2013, first defendant sold the two plots of land to the second and third defendants at the price of RM2.30 per square feet for first plot (Lot 5368) and RM2.60 per square feet for second plot (Lot 5589) when in

1997, 16 years prior to that, in stark contrast, the order obtained by the first defendant was to sell the two plots of land at approximately RM4 per square feet to an unnamed company. Surely it defies logic that since the subsequent purchasers and the sale price at the subsequent date is lower than the sale price intended initially and given that there was no valuation done by the first defendant, it is incumbent for the first defendant to apply to the court for a fresh order under s. 60(4) PAA 1959.

[65] By failing to comply with the above, in our judgment, the first defendant has breached his fiduciary duties as an administrator of the deceased's estate alluded in para. 46 above and his statutory duties under s. 60(4) PAA 1959 which rendered the sale of the two plots of land to the second and third defendants voidable pursuant to s. 60(6) PAA 1959. Further, we are of the view that the learned judge failed to appreciate that the first defendant breached his statutory duties under s.17 SEDA 1955 and the relevant SED Regulations. Therefore, the sale of the two plots of land to the second and third defendants ought to be set aside.

Whether The Title To The Two Plots Of Land Is "Defeasible"?

[66] The learned judge at para. 61 of Her Ladyship's grounds held the second and third defendants are *bona fide* purchasers for valuable consideration and hence their title is indefeasible. To reiterate, this was the submission of the second and third defendants.

[67] With respect, we disagreed with the second and third defendants' submission and we find the learned judge's finding is misconceived.

Section 340(2) of the National Land Code ('NLC') provides:

> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) ...
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) ...
>
> (3) Where the title or interest of any person or body **is defeasible** by reason of any of the circumstances specified in subsection (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (emphasis added)

[68] There is merit in the submission of the plaintiffs that the issue of whether the second and third defendants are *bona fide* purchasers for valuable consideration is immaterial to this case. What is apposite in this appeal is whether the second and third defendants have "deferred indefeasibility" or "immediate indefeasibility" which in turn will depend on whether they are "immediate" or "subsequent" purchasers of the two plots of land. In the recent Federal Court case of *See Leong Chye & Anor v. United Overseas Bank Bhd & Another Appeal* [2018] 10 CLJ 1; [2019] 1 MLJ 25, it was held that it has been laid in case laws that the proviso to s. 340(3) of the NLC provides for deferred indefeasibility and not immediate indefeasibility. On this point, the Federal Court at p. 15 (CLJ); p. 37 (MLJ) paras [51] to [52] referred to another Federal Court case of *Tan Ying Hong v.Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1 which held as follows:

> [51] We are of the view that the proviso is directed towards the provision of sub-s (3) alone and not to the earlier subsection. This in our view is supported by the use of the words 'in this subsection' in the proviso. Therefore its application could not be projected into the sphere or ambit of another provisions of s. 340.
>
> [52] Furthermore, even though sub-s. (3)(a) and (b) refer to the circumstances specified in sub-s. (2) they are restricted to subsequent transfer or to interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any land.

[69] The Federal Court in *See Leong Chye* (*supra*) referred to a host of other Federal Court cases, among which is the Federal Court case of *Kamarulzaman bin Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768 and acknowledged that the said case set out the guide for determining when a purchaser falls under the proviso to s. 340(3) of the NLC. The Federal Court in *See Leong Chye* at p. 16 (CLJ); p. 38 para. [25] (MLJ) quoted a passage of the judgment of Jeffrey Tan FCJ (as he then was) in *Kamarulzaman* (*supra*) which states:

> [41] Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to trial courts. Whenever a registered title or interest is sought to be set aside under s. 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s. 340(2) has been made out. If the title or interest is registered in the name of a subsequent purchase, then the vitiating elements in

> s. 340(2) would not affect the title or interest of a *bona fide* subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a subsequent purchaser is indefeasible.

[70] In the premises, we are of the view that the learned judge clearly erred in law and in fact when Her Ladyship found the second and third defendants' title to be indefeasible because they are *bona fide* purchasers for valuable consideration. Quoting what Jeffrey Tan FCJ (as he then was) said in *Letchumanan Chettiar Alagappan (AS Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697 (which case was referred in *See Leong Chye*) (at p. 17 (CLJ); p. 39 para. [27] (MLJ)):

> In the wake of *Tan Ying Hong, Kamarulzaman bin Omar & Ors v. Yakub bin Husin & Ors*, and *Samuel Naik Siang Ting v. Public Bank Bhd*, **the concept of immediate indefeasibility of the title of an immediate purchaser was passé, if not already in 2010 then certainly in January 2016.** Only a subsequent purchaser is entitled to raise the shield of indefeasibility ... **the *bona fides* of an immediate purchaser is not a shield to defeasibility.** The defeasible title of an immediate purchaser is still liable to be set aside.
>
> (emphasis added)

[71] Applying the legal principles from the host of high authorities cited, it is unequivocal that the second and third defendants are immediate purchasers of the two plots of land and therefore immediate indefeasibility does not attach to their titles, the proviso to s. 340(2) of the NLC does not apply and it does not matter whether the second or third defendants are "*bona fide* purchasers" for value or not. In our judgment, the sale of the two plots of land shall be liable to be set aside and the titles conferred on the second or third defendants should be revoked on the basis that the titles were acquired pursuant to a void instrument, namely the order dated 24 January 1997.

Whether There Was Proper Valuation Of The Two Plots Of Land?

[72] We have shown above that in the determination of the disposal of land of a deceased who died intestate by an administrator or even by an executor, be it under s. 60(4) PAA 1959 or s. 17 SEDA 1955, what is of paramount importance is the interest of the beneficiaries. In the case of the former, it is incumbent for them to obtain the best possible price invariably based on a valuation report. In the case of the latter, the fact that the Land Administrator has to ensure that "the sale price which is equal to the market value of the land" or "any value as agreed by the beneficiaries and deem fit

by the Land Administrator has been determined" presupposes the best possible price for the land is obtained in the first place by the administrator before he puts in an application to the Land Administrator.

[73] On this note, the learned judge held that the first defendant had obtained the best possible price when Her Ladyship said:

> [32] Defendan pertama semasa pemeriksaan balas oleh peguam cara plaintif telah menyatakan harga RM700,000.00 adalah harga yang terbaik yang diperolehinya kerana hartanah tersebut terletak agak pedalaman.

[74] The plaintiffs contended that the sale of the two plots of land by the first defendant to the second and third defendants was not based on the market value of the land at the point of sale in 2013. The plaintiffs had called the valuer, Miss Lim Yee Pheng (PW1) from Raine & Horne International Zaki & Partners Sdn Bhd who prepared the valuation reports of the two plots of land. PW1 concluded the market value as at 2014 is as follows:

(i) for Lot 5589 of 2.454 acres, it was RM450,000 which however was sold to the second and third defendants for RM250,000 with a price differential of RM200,000; and

(ii) for Lot 5368 of 6.1 acres, it was RM1,340,000 which however was sold to the second and third defendants for RM700,000 giving a price differential of RM640,00.

[75] Counsel for the second and third defendants submitted that the two valuation reports were not conclusive of the market value of the two plots of land essentially on the grounds that PW1 did not conduct the physical inspection of the two plots of land but was conducted by her assistant, one Cik Siti Zamilah who was not called as a witness and that PW1 agreed that her findings in the valuation reports are "sekadar pendapatnya sahaja."

[76] As for the two valuation reports, the learned judge held that the valuation therein was not admissible due to the following reasons:

> SP1 telah mengesahkan bahawa bukan beliau yang mengendalikan pemeriksaan fizikal ke atas dua hartanah tersebut tetapi seorang yang bernama Siti Zamilah yang telah memasuki tanah-tanah tersebut untuk mengendalikan pemeriksaan fizikal. SP1 bukanlah pihak yang telah melihat sendiri dua hartanah tersebut sebaliknya hanya bergantung kepada laporan oleh Siti Zamilah tersebut dan Siti Zamilah tidak dipanggil untuk memberi keterangan.
>
> (para 51 of grounds)

Her Ladyship further held that the plaintiffs failed to prove that the two plots of land were sold at below market price due to the following:

SP1 juga telah bersetuju bahawa apa-apa penemuan yang dibuat olehnya melalui laporan-laporan penilaian tersebut adalah sekadar pendapatnya sahaja. (para 52 of grounds)

[77] With respect, we are of the considered view that the learned judge fell into error in her abovesaid findings and these are the same points submitted by the second and third defendants before us and therefore, we say, there is no merit in their submission for these reasons. We find that PW1 arrived at the market value of the two plots of land based on comparative studies of the land sold in the neighbouring areas as per his testimony in his witness statement in Q&A (s) 11 and 11A. We find it necessary to reproduce the same as follows:

11. Q: Could you please elaborate on the sales evidence that mentioned in your testimony No. 10 for Lot 5589?

12. A: In arriving at the market value for Lot 5589 in the sum of RM450,000.00 as at 19.2.1014, I took into account the following sales and purchase transactions:

i. 2 Lands measuring 1.999 acres sold on 28.2.2013 and 22.7.2013 and for the sum of RM300,000.00 and RM400,000.00 respectively.

ii. Land measuring 8.698 acres was sold on 13.3.2013 for RM1,842,150.00 and 7.655 acres sold on 31.5.2013 for RM1,531,200.00.

Further, in arriving at the market value of RM490,000.00 as at 2.4.2015, I took into account, sales and purchase of lands measuring 1.999 acres sold on 30.5.2014 for RM350,000.00 and 3,1160 acres sold on 12.9.2014 for RM678,650.00 Comparable plan showing acres of land sold in at page 144 of the CBD.

11A. Q: What are the sales evidence for Lot 5368?

A: In arriving at the market value for Lot 5368 in the sum of RM1,340,000.00 as at 19.2.2014, I took into account the following 5 sales and purchase transactions:

(i) 5.9800 acres sold on 31.12.2012 for RM1,300,00.00

(ii) 6.5755 acres sold on 19.1.2013 for RM2,004,970.00

(iii) 6.1109 acres sold on 12.4.2013 for RM1,800,000.00

(iv) 5.9923 acres sold on 19.8.2013 for RM1,670,557.00 and

(v) 6.2617 acres sold on 3.9.3023 for RM1,772,456.00.

[78] Regarding the argument that PW1 agreed that his findings in the valuation reports are "sekadar pendapatnya sahaja" which found favour with the learned judge, we observed that clarification was sought from PW1 by counsel for the plaintiffs (NOP pp. 21-22, "rekod rayuan tambahan"). We

have examined the evidence of PW1 in re-examination where he explained that the comparative studies were made based on the sales and purchase transactions that was recorded in the "Jabatan Penilaian dan Perkhidmatan Harta".

[79] Further, there were no valuation reports produced by the second and third defendants and therefore the evidence of PW1 which remain unchallenged put to naught the second and third defendants' submission that "SP2 (fifth plaintiff) 'telah menggunakan perkataan "harga pasaran" di dalam laporan polis bertarikh 2 Jun 2014 (yang) dibuat olehnya. Namun beliau gagal menyatakan apakah harga pasaran pada tahun 2013 sewaktu 2 (dua) plot tanah tersebut dijual.' This is because in the absence of any valuation report challenging the two valuation reports tendered by PW1, it is not open to the second and third defendants to challenge the derivation of the market value arrived at by PW1. Here we agreed with what was held in *People Realty Sdn Bhd v. Hong Leong Bank Bhd & Anor* [2008] 1 CLJ 73; [2007] 6 MLJ 595 at 599 para. [9], *albeit* in the context of an originating summons seeking, among others, for an order for sale of land. This court was of the view that in the absence of any affidavit evidence and a valuation report from the appellant challenging the valuation report submitted by the first respondent bank who created a charge over the land to secure the repayment of banking facilities granted by them to the appellant, it is not open to the latter now to challenge the derivation of the reserve price.

[80] On the issue of rejection by the learned judge of PW1's evidence on the ground that the physical inspection was conducted by her assistant, we find the case of *KFJ Sjarah House (M) Sdn Bhd v. Lembaga Kemajuan Wilayah Pulau Pinang* [2011] 1 LNS 1127; [2012] 3 MLJ 850 which dealt with a point similar to the facts in this appeal is of relevance. The High Court in that case at 866 para. [22] (MLJ) held that the valuation report of SP7 was prepared by Miss Goh and she and others assisted in the valuation work under the supervision of SP7 but the final approval of the valuation was by SP7 who was the actual authority who signed the report; SP7 who authenticated the report was the actual maker of the document and it is not invalidated by the hearsay rule merely because Miss Goh was the one who prepared it.

[81] In this regard, we agreed with the view in *KFJ Sjarah House (M) Sdn Bhd* (*supra*) and find that with respect, the learned judge had erred in not admitting the evidence of PW1 merely on the ground that she was assisted by her assistant who conducted the physical inspection. What is material is the learned judge failed to appreciate PW1's unequivocal evidence that the two valuation reports were prepared and signed by her, a registered valuer and estate agent. We are of the view that the fact that PW1 did not do the physical inspection and the assistant was not called as a witness does not diminish the probative value of the reports as what is paramount is that PW1 had categorically stated she had prepared and signed the reports.

[82] At para. 31 of Her Ladyship's grounds, the learned judge stated: A

> [31] Namun berdasarkan taksiran oleh Lembaga Hasil Dalam Negeri di mana telah menaksirkan nilai hartanah untuk Geran Mukim 895, Lot 5589, Mukim of Labu, District of Seremban, Negeri Sembilan Darul Khusus hanya RM250,000.00. Untuk hartanah bagi Geran Mukim 452, Lot 5368 Mukim of Labu, District of Seremban, Negeri Sembilan Darul Khusus tidak mempunyai legal access ke hartanah tersebut. Untuk masuk ke hartanah tersebut, plaintif-plaintif atau defendan pertama defendan kedua dan ketiga harus melalui hartanah pihak ketiga. B

[83] Whilst it is true the notice of assessment from LHDN dated 23 April 2014 states that "nilai pasaran (tarikh perjanjian jual beli/surat cara pindah milik)" is RM250,000 for the 2.454 acres (second plot), however we observed that the learned judge failed to consider that the notice of assessment from LHDN dated 22 April 2014 for 6.101 acres (first plot) was valued at RM1,200,000. In our judgment, the consideration by the learned judge that the first plot of land did not have access road to the said property does not diminish the probative value of the unchallenged evidence of the two valuation reports which was premised on the comparative studies made based on the sales and purchase transactions that was recorded in the "Jabatan Penilaian dan Perkhidmatan Harta." Thus we agreed with the submission of the plaintiffs that when the first defendant sold the first plot for RM700,000, there was a gross difference of RM500,000. C D E

[84] In light of the foregoing reasons, the learned judge's finding that the plaintiffs failed to prove that the two plots of land were sold at below market price (para 52 of grounds) is not true and is inaccurate.

Other Matters F

[85] There is one other matter which we considered but which we find parties did not submit before us as it impinged on the relief prayed for in para 23(b) of the re-amended statement of claim which reads:

> 23 AND the plaintiffs claim: G
>
> (b) That the first defendant be removed as an Administrator of the deceased's estate and the grant of letters of administration to be granted to Moorali Tharan a/l Narayana, the abovenamed fifth plaintiff in this suit.

[86] The first defendant in Q&A 14 of his witness statement stated: H

> Q14 Saya rujuk anda kepada perenggan 10.2 dan 10.3 Pemyataan Tuntutan Plaintif, di mana Plaintif-plaintif telah menyatakan bahawa surat – Surat Pentadbiran harta pusaka Si Mati telah diberikan kepada Plaintif ke-5 iaitu Encik Mooralitharan a/l Narayanan? Boleh kamu sahkan sama ada kenyataan tersebut adalah benar? I

A14 Saya menafikan pernyataan tersebut. Saya menegaskan di sini pada tarikh perbicaraan yang kedua, Encik Mooralitharan telah menolak dirinya sebagai Pentadbir memandangkan beliau mempunyai masalah-masalah peribadi dan beliau pada ketika itu merupakan seorang yang bujang.

[87] Having combed through the relevant NOP (Rekod Rayuan (Bhg B Jld 1 (ms. 218-434) pp. 413, 414 and 416 top pagination), we noticed during the cross-examination of the first defendant by counsel for the plaintiffs, the following transpired:

ADS: Yang Arif, we take, actually what my learned friend is doing is we had took the position and it's in the Statement of Claim as well, that initially the application was made to be in the name of one of the plaintiffs that is Mr Moorali but when the order was, came up, it was under the Defendants, First Defendant's name.

JSM: Correct.

Further, there was confirmation by the first defendant of the following:

ADS: It also states there that he made, when the witness made the application, Mr Haridas, when you made the application, you asked that the administratorship be given to Mr Moorali Tharan:?

Haridas: Benar, Yang Arif.

[88] In fact what the plaintiffs pleaded in the statement of claim is:

10.2 At the conclusion of the said hearing the Grant of Letters of Administration of the deceased's estate was granted to the fifth plaintiff.

10.3 However, the Land and Mineral Office of Negeri Sembilan inadvertently issued the Grant of Letters of Administration to the first defendant ("the order dated 28.9.1990") and hence the first defendant was appointed as the Administrator of the deceased's estate.

[89] The position taken by the plaintiffs save for the fact, we have no explanation for the use of "inadvertently" in para 10.3 of the re-amended statement of claim was confirmed by counsel for the first defendant and admitted by first defendant himself that he had asked for the administratorship to be given to the fifth plaintiff (PW2). We find it is crystal clear from the NOP before the Land Administrator on 28 September 1990 that upon the application of the first defendant and consented to by the named beneficiaries therein, the fifth plaintiff (PW2) was appointed as administrator of the deceased's estate. What is written in the NOP is as follows:

Hukuman

Saya Mustapha bin Haji Alias. Pem. PT Seremban dengan ini memerintahkan semua bahagian harta simati diturunmilik kepada Moorali Tharan a/l Narayanan sebagai Pentadbir.

Perintah $2.00

Carian Harta Tiada

t.t
28/9/90

[90] However, for some unexplained reason the order dated 28 September 1990 bore the name of the first defendant as the administrator despite the order made by the Land Administrator that the fifth plaintiff (PW2) is the administrator. We are unable to accept the self-serving statement of the first defendant in Q&A 14 above as his answer is inconsistent with the NOP before the Land Administrator on 28 September 1990 and it is inaccurate for him to say that "pada tarikh perbicaraan yang kedua, Encik Mooralitharan telah menolak dirinya sebagai pentadbir" because we noticed that the first defendant's name appeared as administrator in the order dated 28 September 1990 as early as 28 September 1990 (first hearing) and not on 24 January 1997 (second hearing) as the first defendant testified in answer 14 of his witness statement.

Conclusion

[91] For all the foregoing reasons, we find there are merits in the appeal which compelled us to exercise our appellate intervention. Accordingly, we unanimously made the following order:

(i) in respect of the appeal against the dismissal of the application to amend the amended statement of claim, we allowed the appeal in terms of prayers (i) and (ii) of encl. 143. The High Court order of 26 October 2016 is hereby set aside;

(ii) in respect of the main appeal, we allowed the appeal of the plaintiffs against the High Court order of 7 July 2017 as per prayers 23 (a) to (e) of the re-amended statement of claim. The High Court order of 7 July 2017 is hereby set aside; and

(iii) awarded to the plaintiffs, costs of RM50,000 here and below subject to allocatur.